

Middlesex University Research Repository

An open access repository of

Middlesex University research

<http://eprints.mdx.ac.uk>

Kerin, Lughaidh and Cullen, Anthony ORCID logoORCID:
<https://orcid.org/0000-0001-6594-8941> (2017) Enforcement of foreign arbitral awards: a London perspective. *International Journal of Diplomacy and Economy*, 4 (3) . pp. 388-398. ISSN 2049-0887 [Article] (doi:10.1504/IJDIPE.2017.10009676)

Final accepted version (with author's formatting)

This version is available at: <https://eprints.mdx.ac.uk/20335/>

Copyright:

Middlesex University Research Repository makes the University's research available electronically.

Copyright and moral rights to this work are retained by the author and/or other copyright owners unless otherwise stated. The work is supplied on the understanding that any use for commercial gain is strictly forbidden. A copy may be downloaded for personal, non-commercial, research or study without prior permission and without charge.

Works, including theses and research projects, may not be reproduced in any format or medium, or extensive quotations taken from them, or their content changed in any way, without first obtaining permission in writing from the copyright holder(s). They may not be sold or exploited commercially in any format or medium without the prior written permission of the copyright holder(s).

Full bibliographic details must be given when referring to, or quoting from full items including the author's name, the title of the work, publication details where relevant (place, publisher, date), pagination, and for theses or dissertations the awarding institution, the degree type awarded, and the date of the award.

If you believe that any material held in the repository infringes copyright law, please contact the Repository Team at Middlesex University via the following email address:

eprints@mdx.ac.uk

The item will be removed from the repository while any claim is being investigated.

See also repository copyright: re-use policy: <http://eprints.mdx.ac.uk/policies.html#copy>

Enforcement of Foreign Arbitral Awards: A London Perspective

Lughaidh Kerin*

School of Law,
Middlesex University
Hendon, London, NW4 4BT, UK
Email: L.Kerin@mdx.ac.uk
*Corresponding author

Anthony Cullen

School of Law,
Middlesex University
Hendon, London, NW4 4BT, UK
Email: A.T.Cullen@mdx.ac.uk

Abstract: The virtues of international arbitration are well known. However, without the ability to enforce foreign arbitral awards, in the event of a party to arbitration failing, refusing or otherwise not honouring the award, international arbitration becomes a paper tiger. This is why the possibility of enforcement pursuant to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is of cardinal importance. Mindful of the UK's treaty obligations under the New York Convention, this paper focuses on the enforcement of foreign arbitral awards from a London perspective. It will do so for two reasons: London has long standing and hard won reputation as one of the truly global centres of international arbitration. It is also recognised as a bellwether for international finance. In light of such recognition, this paper will examine the approach adopted by the English Judiciary to international arbitration awards and ultimately their enforcement or otherwise in the courts of England and Wales.

Keywords: Arbitration; Arbitral Awards; New York Convention; London; Commercial Law; International Commercial Arbitration; Law Reform; Enforcement; Dispute Resolution; Public Policy; Arbitrability; Private international law; Public international law

Biographical notes: Lughaidh Kerin, B.A., LL.B., LL.M., Solicitor (Ireland, England & Wales) Attorney & Counselor at Law (New York), FCI Arb, Accredited Mediator, is a Senior Lecturer

in Clinical Legal Education at the School of Law, Middlesex University, London. Prior to taking up this position he was a Lecturer in Law at the National University of Ireland Galway (2009-2014). Prior to this he was in private practice. His interests focus mainly on Dispute Resolution in its many and varied incarnations, Legal & Business Ethics and Clinical Legal Education.

Anthony Cullen, B.A., M.A., LL.M., Ph.D. is a Senior Lecturer in Law at the School of Law, Middlesex University, London. Prior to taking up this position, he was a Research Fellow at the School of Law, University of Leeds (2011-2013) and a Research Fellow at the Lauterpacht Centre for International Law, University of Cambridge (2007-2011). His research interests focus mainly on international humanitarian law, international human rights law and the development of foreign policy in these areas.

1. Introduction

The development of the doctrine of international arbitration, considered from the standpoint of its ultimate benefits to the human race, is the most vital movement of modern times. In its relation to the well-being of the men and women of this and ensuing generations, it exceeds in importance [to] the proper solution of various economic problems which are constant themes of legislative discussion and enactment. (Taft, 1907: 1)

The virtues of international arbitration are well known. However, without the ability to enforce foreign arbitral awards, in the event of a party to arbitration failing, refusing or otherwise not honouring the award, international arbitration becomes a paper tiger. This is why the possibility of enforcement pursuant to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is of cardinal importance. Mindful of the UK's treaty obligations under the New York Convention, this paper focuses on the

enforcement of foreign arbitral awards from a London perspective. It will do so for two reasons: London has long standing and hard won reputation as one of the truly global centres of international arbitration. It is also recognised as a bellwether for international finance. In light of such recognition, this paper will examine the approach adopted by the English Judiciary to international arbitration awards and ultimately their enforcement or otherwise in the courts of England and Wales.

First, it will begin by highlighting the significance of the New York Convention as the bedrock for the enforcement of foreign arbitral awards. Next, the paper will consider how the terms of the Convention have been interpreted and applied by English Courts. Then, the extra-judicial comments of Lord Thomas on balancing the relationship between the courts and arbitration will be explored.¹ In adopting this approach, a number of questions will be raised concerning the future development of law and the prospects for refining its interpretation, in particular in relation to the scope for the possibility of appeal.

2. International Commercial Arbitration and the Recognition and Enforcement of Foreign Arbitral Awards

Arbitration is a creature of contract. This creature exists by virtue of a dispute resolution clause in a contract or as a result of an agreement in writing made at a later stage between the parties. In either case, a key and fundamental tenet of arbitration is that the process of arbitration is based on consent: It cannot occur unless an agreement to arbitrate exists between the parties. Arising from this consent is the agreement that the losing party will honour the award as and when same is rendered by the Arbitrator. Thankfully, the vast majority of arbitral awards are honoured (Redfern, 2015: 29).

In order for the process of international arbitration to be effective, there must be a way of enforcing that a foreign arbitral award when one party resists. This leads to the question as

¹ John Thomas, Developing commercial law through the courts: rebalancing the relationship between the courts and arbitration, The Third Annual Bailii Lecture, Freshfields, London, 18 March 2016. Available at: <https://www.judiciary.gov.uk/announcements/speech-by-the-lord-chief-justice-of-the-bailii-lecture-2016/> (Last visited: 19 May 2017)

to how the courts in one country are to be compelled to recognise and enforce an award rendered in another. The process is one that is facilitated by treaties of international law. The most significant of these treaties – the one that has the widest scope of application – is the 1958 New York Convention of the Recognition and Enforcement of Foreign Arbitral Awards.²

The New York Convention is widely recognised as the foundational instrument of international arbitration. According to Gillis Wetter, one of the early pioneers of international arbitration, the Convention is ‘the single most important pillar on which the edifice of international arbitration rests’.³ The text of the New York Convention consists of 16 articles without a preamble. The first article states the applicability of the treaty:

² Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 330 UNTS 38 (1958). As of 20 May 2017, there are 157 parties to the New York Convention: Afghanistan, Albania, Algeria, Andorra, Angola, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belgium, Benin, Bhutan, Bolivia (Plurinational State of), Bosnia and Herzegovina, Botswana, Brazil, Brunei Darussalam, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Canada, Central African Republic, Chile, China, Colombia, Comoros, Cook Islands, Costa Rica, Côte d'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Democratic Republic of the Congo, Denmark, Djibouti, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Estonia, Fiji, Finland, France, Gabon, Georgia, Germany, Ghana, Greece, Guatemala, Guinea, Guyana, Haiti, Holy See, Honduras, Hungary, Iceland, India, Indonesia, Iran (Islamic Republic of), Ireland, Israel, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Kuwait, Kyrgyzstan, Lao People's Democratic Republic, Latvia, Lebanon, Lesotho, Liberia, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malaysia, Mali, Malta, Marshall Islands, Mauritania, Mauritius, Mexico, Monaco, Mongolia, Montenegro, Morocco, Mozambique, Myanmar, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Oman, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Rwanda, Saint Vincent and the Grenadines, San Marino, Sao Tome and Principe, Saudi Arabia, Senegal, Serbia, Singapore, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, State of Palestine, Sweden, Switzerland, Syrian Arab Republic, Tajikistan, Thailand, The former Yugoslav Republic of Macedonia, Trinidad and Tobago, Tunisia, Turkey, Uganda, Ukraine, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America, Uruguay, Uzbekistan, Venezuela (Bolivarian Republic of), Viet Nam, Zambia, and Zimbabwe. See: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited: 20 May 2017)

³ J. Gillis Wetter, ‘The Present Status of the International Court of Arbitration of the ICC: An Appraisal’ (1990) 1 *American Review of International Arbitration* 91-107 at 93.

This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

An extremely important treaty for international trade, the New York Convention is recognised as having a strong pro-enforcement bias (Redfern, 2015: 569-570). The United Kingdom acceded to the treaty on 24 September 1975 and, consistent with the terms of the Convention, the Courts of England and Wales have adopted an approach 'friendly' to arbitration (Parish, 2010: 661).

Before exploring the relevant jurisprudence, it is necessary consider the procedures for enforcement envisaged by the New York Convention for the recognition and enforcement of awards. Article IV of the Convention states:

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

- (a) the duly authenticated original award or a duly certified copy thereof;

- (b) the original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

The party which seeks recognition and enforcement of an arbitral award must therefore produce the arbitral award and the agreement to arbitrate before the relevant court. These terms are reflected in Section 102 of the Arbitration Act 1996. Under the terms of both the

New York Convention and the Arbitration Act 1996, the court must grant recognition and enforcement unless grounds for refusal exist. The grounds upon which the recognition and enforcement of an award may be refused are listed under Article V of the Convention and are mirrored in section 103 of the Arbitration Act 1996:

(1) Recognition or enforcement of a New York Convention award shall not be refused except in the following cases.

(2) Recognition or enforcement of the award may be refused if the person against whom it is invoked proves—

(a) that a party to the arbitration agreement was (under the law applicable to him) under some incapacity;

(b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made;

(c) that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;

(d) that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration (but see subsection (4));

(e) that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country in which the arbitration took place;

(f) that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.

(3) Recognition or enforcement of the award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to recognise or enforce the award.

With regard to the application of these grounds, it is important to note that there is no review of the actual merits of an award. Section 81(2) of the Arbitration Act 1996 states: 'Nothing in this Act shall be construed as reviving any jurisdiction of the court to set aside or remit an award on the ground of errors of fact or law on the face of the award.' Neither the Arbitration Act nor the New York Convention provides authority for courts to substitute their decision for the decision of the arbitral tribunal. When an award is issued, it is deemed final and binding on the parties to the arbitration.

It is also important to note that the grounds listed are exhaustive and the burden of proof rests on the respondent. It is up to the party who wishes to challenge the award to furnish proof that one or more of the grounds listed in the New York Convention exist for refusal. Bearing in mind the pro-enforcement orientation of New York Convention, each of the grounds stated is to be construed narrowly.

Section 103(3) – based on Article 5(2) of the New York Convention – serves to protect the public interests of the state. Here the concepts of arbitrability and public policy are key. In order for a dispute to be arbitrable, the subject-matter must be 'capable of settlement by arbitration' according to the terms of Article II (1) of the Convention. Public policy in this context – in the context of the recognition and enforcement of foreign arbitral awards – is not to be equated with the concept of domestic public policy. Although no definition is provided in the New York Convention, public policy in the sense of Article 5(2)(b) is more often taken as referring to the 'international public policy' of a State (Moses, 2012: 228). A definition of the term was provided by the International Law Association in a resolution adopted at its 70th Conference in 2002:

1(c) The expression "international public policy" is used ... to designate the body of principles and rules recognised by a State, which, by their nature, may bar the recognition or enforcement of an arbitral award rendered in the context of international commercial arbitration when recognition or

enforcement of said award would entail their violation on account either of the procedure pursuant to which it was rendered (procedural international public policy) or of its contents (substantive international public policy).

1(d) The international public policy of any State includes: (i) fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned (ii) rules designed to serve the essential political, social or economic interests of the State, these being known as “lois de police” or “public policy rules” and (iii) the duty of the State to respect its obligations towards other States or international organisations.⁴

Considered together with the grounds for refusal and the requirement of arbitrability, the narrow construal of public policy reflects the pro-enforcement bias of the New York Convention.⁵ This deference to the recognition and enforcement of awards is reflected in the approach adopted both before and after the Arbitration Act 1996 by the Courts of England and Wales. The section that follows will focus on three cases to illustrate this point.

3. The Enforcement of Arbitral Awards before the Courts of England and Wales

Should a losing party have failed, refused or otherwise not honoured an arbitral award in full, then this private matter has the potential to enter the public domain. Then there are two principal methods available in England whereby it can be enforced:

- 1.) To obtain leave of the court to enforce the award in the manner as a judgment or order of the Court to the same effect under the summary procedure provided for by section 66 of the Arbitration Act 1996, or

⁴ International Law Association Recommendations on the Application of Public Policy as a Ground for Refusing Recognition or Enforcement of International Arbitral Awards, Annex to Resolution 2/2002 on International Commercial Arbitration, adopted at the 70th Conference of the International Law Association held in New Delhi, India, 2-6 April 2002.

⁵ *Honeywell International Middle East Ltd v Meydan Group LLC* [2014] EWHC 1344 (TCC) at para. 67.

- 2.) To bring an action on the award and then to seek a judgment from the Court for the same relief as is granted in the award.⁶

The *ex parte* application to the High Court pursuant to section 66 must be supported by an affidavit which exhibits the arbitration agreement and the award (a certified translation into English if either the agreement or award is in a foreign language is also required). The application must further state:

- a.) The name and address of the Applicant as well as the name and the usual or last known place of residence or business of the person against whom it is sought to enforce the award; and
- b.) The award has not been complied with or, as the case may be, the extent to which it has not been complied with at the date of the application.⁷

To illustrate how the recognition and enforcement of arbitral awards is interpreted by the Courts of England and Wales, it is useful to consider *Soleimany v Soleimany*,⁸ *Honeywell International Middle East Limited v Meydan Group LLC*,⁹ and the relatively recent Supreme Court case of *Dallah Real Estate & Tourism Holding Co v Pakistan*.¹⁰ These cases highlight judicial attitude on enforcement of foreign Arbitral awards both pre- and post-1996 Arbitration Act. In doing so, they convey a degree of deference towards the enforcement of foreign arbitral awards.

Soleimany v Soleimany provides a useful illustration of how the fact of a commercial practice being in conflict with public policy can be used as a basis for the refusal of an arbitral award. This decision of the Court of Appeal in this case of case concerned a dispute between a father and son over the division of proceeds from the smuggling of carpets out of Iran, which came to £576,574. The carpets had been taken illegally, in breach of Iranian

⁶ Arbitration Act 1996, Chapter 23, Section 66; Civil Procedure Rules, Part 62.

⁷ Arbitration Act 1996, Chapter 23, Sections 66, 100, 101, 102 & 104.

⁸ *Soleimany v Soleimany* [1999] QB 785.

⁹ *Honeywell International Middle East Ltd v Meydan Group LLC* [2014] EWHC 1344 (TCC).

¹⁰ *Dallah Real Estate & Tourism Holding Co v Ministry of Religious Affairs* [2011] 1 AC 763.

revenue laws. After mediation had failed, the father and son, who were both Iranian Jews, agreed to arbitration by the *Beth Din*, a rabbinical court, with Jewish law as applicable law. When the son sought enforcement of the subsequent arbitral award, the father argued that his son's claim was void and unenforceable in an English court due to the fact that it was founded on an illegal agreement. It was contended that recognition of the award would be contrary to public policy, pursuant to Section 26 of the Arbitration Act of 1950. This argument prevailed and Court of Appeal declined to enforce the award.

The case turned on the fact that the illegality was specifically referred to in the text of the arbitral award:

The court is in our view concerned to preserve the integrity of its process, and to see that it is not abused. The parties cannot override that concern by private agreement. They cannot by procuring an arbitration conceal that they, or rather one of them, is seeking to enforce an illegal contract. Public policy will not allow it.¹¹

The applicable law that had been chosen by the parties was Jewish law. Under Jewish law the illegality was considered not relevant; it did not impact on the rights of the parties. This decision of the Court of Appeal illustrates the importance of public policy considerations where the recognition and enforcement of any award is sought. It highlights the importance of protecting the integrity of the process. While deference exists, the requirements of public policy place an important limitation on the recognition and enforcement of foreign arbitral awards.

The High Court case of *Honeywell International Middle East Limited v Meydan Group LLC* provides further perspective on the interpretation of public policy as a ground for refusing enforcement. The claimant in this case sought enforcement of an award rendered by the Dubai International Financial Centre for approximately £12.6 million. The defendant argued that the order for enforcement of the award should be set aside because the contract was procured by the Claimant bribing public servants in Dubai.

¹¹ *Soleimany v Soleimany* [1999] QB 785 at 800.

The Court dismissed the application, ruling that the *Meydan Group LLC* could not substantiate the alleged bribery. Justice Ramsey stated that ‘even if the allegation of bribery were made out and the bribery did in some way affect the Contract entered into directly between Meydan and Honeywell that would not, because of the principle of separability, have any effect on the arbitration agreement in Clause 20.6 of the Contract which is treated as a distinct agreement’.¹² In addition, it was held that ‘whilst bribery is clearly contrary to English public policy and contracts to bribe are unenforceable, as a matter of English public policy, contracts which have been procured by bribes are not unenforceable’.¹³ This again highlights a deferential approach to the recognition and enforcement of awards and the very restrictive interpretation given to public policy in this context. Commenting on public policy as a ground for non-enforcement of an award, Ilias Bantekas notes that ‘public policy defences very rarely succeed in pro-arbitration industrialised states’ (Bantekas, 2015: 245). He states that:

[T]he regime of the 1958 New York Convention (and international commercial arbitration more generally) is not fragmented or distinct from general international law. Hence, a construction of public policy by the forum should not lead to the recognition and enforcement of awards encompassing transnational and international offences. (Bantekas, 2015: 245).

The pro-enforcement approach employed in *Honeywell* was refined in the 2010 Supreme Court case of *Dallah Real Estate & Tourism Holding Co v Pakistan*. This case turned on the question of who was named as party to an arbitration agreement. The background of this case concerned the proposed funding of accommodation for the Hajj in Saudi Arabia by the Ministry of Religious Affairs of the Government of Pakistan. Pakistan established the Awami Hajj Trust as a convenient vehicle for the project. The negotiations between Dallah and the government culminated in an agreement, which was expressly made between Dallah and the Trust. The government was not expressed to be a party to the agreement, nor did it

¹² *Honeywell International Middle East Ltd v Meydan Group LLC* [2014] EWHC 1344 (TCC) at para. 93.

¹³ *Ibid.*, para. 185.

sign it in any capacity. Relatively soon thereafter there was a change in government and the Trust entity ceased to exist.

Pursuant to the arbitration agreement contained in the contract, arbitration was held in Paris. The arbitral tribunal made an initial interim award wherein they found that the trust was the alter ego of Pakistan and that Pakistan was therefore a true party to the agreement. Subsequently, the arbitral tribunal issued substantial money damages award against the Government of Pakistan. Ultimately, *Dallah* sought enforcement of these awards in England.

In its decision on the claimant's appeal, it was held that 'the English court is entitled (and indeed bound) to revisit the question of the tribunal's decision on jurisdiction if the party resisting enforcement seeks to prove that there was no arbitration agreement binding upon it under the law of the country where the award was made.'¹⁴ While the Supreme Court held that it was necessary to revisit the decision of the arbitral tribunal, this did not imply change to the 'pro-enforcement' policy reflected in the New York Convention:

It is true that the trend, both national and international, is to limit reconsideration of the findings of arbitral tribunals, both in fact and in law. It is also true that the Convention introduced a "pro-enforcement" policy for the recognition and enforcement of arbitral awards. The New York Convention took a number of significant steps to promote the enforceability of awards ... The New York Convention does not require double *exequatur* and the burden of proving the grounds for non-enforcement is firmly on the party resisting enforcement. Those grounds are exhaustive.¹⁵

The position adopted by the Supreme Court in *Dallah* is consistent with earlier case-law. The New York Convention is 'pro-enforcement' in its orientation; the grounds listed for non-enforcement are exhaustive and are to be interpreted in terms consistent with the object and

¹⁴ *Dallah Real Estate & Tourism Holding Co v Ministry of Religious Affairs* [2011] 1 AC 763 at para. 104.

¹⁵ *Dallah Real Estate & Tourism Holding Co v Ministry of Religious Affairs* [2011] 1 AC 763 at para. 101.

purpose of the treaty. The possibility of appeal on a point of law is also been extremely limited under Section 69 of the Arbitration Act 1996. In accommodating finality in the recognition and enforcement of arbitral awards, the courts have strengthened the perception of England and Wales as jurisdiction that is friendly to arbitration. The section that follows will examine a development that has been described as a 'threat' to the 'arbitration-friendly' reputation of jurisdiction and the status of London as a world-leading centre for arbitration.

4. Rebalancing the Relationship between the Courts and Arbitration

On 9 March 2016 the Right Hon. Lord Thomas of Cwmgiedd, Lord Chief Justice (LCJ) of England and Wales delivered the 4th Bailii lecture and used this opportunity to reflect on commercial law and arbitration. The lecture was entitled 'Developing commercial law through the courts: rebalancing the relationship between the courts and arbitration' (2016). The LCJ intimated his view that the courts deference to arbitration had in certain spheres been detrimental to the growth and development of commercial law. He advanced a position that in order for the common law to grow and develop in certain areas of commercial Law, there should be a 'healthy diet' of appeals for higher courts, enabling the development of the law in these areas. The LCJ commented that since the introduction of the test contained in section 69 of the Arbitration Act 1996, 'far fewer appeals from arbitral awards come before the courts, as only a small number satisfy the test for the grant of permission to appeal ... the effect in reducing cases coming to the court has been dramatic.' (2016: para 21). Accordingly, the LCJ suggested that one way of achieving a 'proper diet of commercial cases' would be to change the existing restriction on appeals in section 69 of the Arbitration Act:

I have no doubt that change to the section 69 test is one of the options that must be considered. The restriction in relation to appeals where the question is one of general public importance is, I have little doubt, a serious impediment to the growth of the common law. The benefits to the development of the common law is therefore obvious as it would increase the potential for greater numbers of appeals which would provide the means

to maintain a healthy diet of appellate decisions, capable of developing the law particularly on issues of general public importance (2016: para 34).

While these were extra-judicial comments, it is important to recognise that they reflect the thinking of an individual who is positioned at the apex of the English and Welsh judicial hierarchy. As such, these comments can not be treated as throw away remarks. With regard to the effect on the development of the law, the LCJ states:

The effect of the diminishing number of appeals compounds the problem that arises from the diversion of more claims from the courts to arbitration. It reduces the potential for the courts to develop and explain the law. This consequence provides fertile ground for transforming the common law from a living instrument into, as Lord Toulson put it in a different context, “an ossuary” ... [T]he consequence has been the undermining of the means through which much of the common law’s strength – its “excellence” was developed – a danger not merely to those engaged in dispute resolution in London, but more importantly to the development of the common law as the framework to underpin the international markets, trade and commerce. (2016: para 22)

As the default method of dispute resolution in a wide swayed of commercial areas, arbitration prevents the ‘diet’ of appeals referred to by Lord Thomas reaching the Supreme Court. Being dealt with in the main outside the judicial system, they are not subject to review or public scrutiny. This has the effect of ‘retarding public understanding of the law, and public debate over its application’. (Thomas, 2016: para 23)

The comments of Lord Thomas caused shock in the London arbitral community and gave rise to a number of responses to rebut or diminish the kernels of his argument, in particular in relation to the potential negative effect of arbitration on the evolution of commercial law. In an article published in *The Times* entitled ‘Reforms will threaten London’s place as a world arbitration centre’, Lord Saville stated:

From the international point of view, any suggestion that the English courts be permitted to interfere in the arbitral process by substituting their

decisions for those of the tribunal chosen by the parties is regarded with little short of astonishment. The parties have expressly agreed to use arbitration as their method of dispute resolution. By doing so they have agreed to accept the decision of their chosen tribunal instead of that of the court. What the English court would have decided is irrelevant.

I must therefore disagree with the lord chief justice. I have no doubt that any move to expand the right of appeal from arbitration awards would be a wholly retrograde step. Far from helping to develop English law, it would be calculated to drive international commercial arbitration away from London, to the great loss of this country.¹⁶

Concurring with the position expressed by Saville, Sir Bernard Eder used his keynote address to the London Branch of the Chartered Institute of Arbitrators to express his 'strong view' that there should be no change to section 69 of the Arbitration Act 1996.¹⁷ Likewise, William Rowley QC in a bulletin for 20 Essex Street entitled 'London Arbitration Under Attack' stated:

With the greatest respect to his Lordship, when regard is had to the nature and size of the caseloads of the Commercial Court, the Court of Appeal, the Supreme Court and the Judicial Committee of the Privy Council, his argument seems nothing short of astonishing. It is true, of course, that English appellate courts now hear fewer arbitration appeals because of the changes made by the 1996 Act, but when the number of commercial cases that come before the Commercial Court and the appellate courts are considered, his argument seems unsupportable. (2016: 5)

¹⁶ Mark Saville, 'Reforms will threaten London's place as a world arbitration centre' *The Times (London)*, 28 April 2016, p. 58.

¹⁷ Bernard Eder, 'Does arbitration stifle development of the law? Should s.69 be revitalised?', Chartered Institute of Arbitrators (London Branch): AGM Keynote Address, Essex Court Chambers, 28 April 2016, available at: <https://essexcourt.com/recent-keynote-address-chartered-institute-arbitrators-sir-bernard-eder> (last visited: 19 May 2017).

The positions expressed by Saville, Eder and Rowley highlight the fact that the businesses who seek to have their dispute resolved in England (including those seeking enforcement of arbitral awards), would prefer to have the certainty of their dispute being resolved by arbitration than the possibility of being 'sucked into' the judicial system. The primary concern of parties engaged in such disputes is in their resolution, not in the growth and development of the common law.

Rather than to delve into the detail of the positions for and against the reform Arbitration Act 1996, it is sufficient to state that these comments indicate the existence of a debate that is likely to continue for some time. Until written judgments delivered from the bench replicate the extrajudicial comments of Lord Thomas, it is not possible to replace the 'may' or 'could' with 'will' or 'should'. It is clear that Lord Thomas' comments have raised a number of significant questions for the future development of the law and by extension the reception of international arbitral awards in the judicial system and their ultimate enforcement by English and Welsh Courts. Only time will tell how these questions will be dealt with, or whether London will retain its privileged place as a centre for the settlement of disputes through international commercial arbitration.

5. Conclusion

In conclusion, while the New York Convention is the capstone of international arbitration, its effectiveness rests on the attitude of domestic courts in the recognition and enforcement of foreign arbitral awards. In the cases highlighted, one can glean the common thread of a pro-enforcement stance, with a willingness to consider disputes on their individual merits. This willingness to expose an award to robust examination should only increase parties' confidence in the integrity of this private dispute resolution process. In light of Lord Thomas's extra-judicial comments, and the potential that the Law Commission may review the Arbitration Act 1996 as part of its 13th programme of law reform,¹⁸ a cloud has appeared on an otherwise clear horizon. Whether Lord Thomas's proposed rebalancing of the

¹⁸ See: <http://www.lawcom.gov.uk/arbitration/> (last visited: 20 May 2017)

relationship between the courts and arbitration occurs, or whether the current *status quo* is maintained, the judicial reception in London is positive and outlook remains favourable.

References

Bantekas, I. (2015). An Introduction to International Arbitration, Cambridge University Press.

Cabrera, J., et al. (2015). "The administrative contract, non-arbitrability, and the recognition and execution of awards annulled in the country of origin: the case of *Commisa v Pemex*." Arbitration International: aiv057.

Colman, A. (2006). "The Worshipful Company of Arbitrators' Master's Annual Lecture 2006: Arbitrations and Judges How Much Interference Should We Tolerate?" Arbitration: the Journal of the Chartered Institute of Arbitrators **72**(3): 217-223.

de Cossío, F. G. (2015). "Enforcement of annulled awards: towards a better analytical approach." Arbitration International: aiv071.

Dore, L. K. (2006). "Public Courts Versus Private Justice: It's Time to Let Some Sun Shine in on Alternative Dispute Resolution." Chi.-Kent L. Rev. **81**: 463.

Eder, B. (2016). Does arbitration stifle development of the law? Should s.69 be revitalised? Chartered Institute of Arbitrators (London Branch). Essex Court Chambers.

Finch, R. (2004). "London: Still the Cornerstone of International Commercial Arbitration and Commercial Law?" Arbitration: the Journal of the Chartered Institute of Arbitrators **70**(4): 256-266.

Jogani, R. (2015). "The Role of National Courts in the Post Arbitral Process: The Possible Issues with the Enforcement of a Set-aside Award." Arbitration: The International Journal **81**(3).

Kurlekar, A. and G. Pillai (2015). "To be or not to be—the oscillating support of Indian courts to arbitration awards challenged under the public policy exception." Arbitration International: aiv066.

Mance, J. (2016). "Arbitration—a Law unto itself?" Arbitration International: aiv072.

Manzoni, C. (2004). International Arbitration The Key Elements. 39 Essex Street.

Moses, M. L. (2012). The principles and practice of international commercial arbitration, Cambridge University Press.

Parish, M. (2010). "The proper law of an arbitration agreement." Arbitration **76**(4): 661-679.

Redfern, A., et al. (2015). Redfern and Hunter on International Arbitration, Oxford.

Roth, R. A. (1984). "Application of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards: *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*" Fordham

Int'l LJ **8**: 194.

Rowley, W. J. (2016). "London Arbitration Under Attack." 20 Essex Street Bulletin.

Saville, M. (2016). Reforms will threaten London's place as a world arbitration centre. The Times. London.

Shenton, D. W. and G. K. Toland (1980). "London as a Venue for International Arbitration: The Arbitration Act, 1979." Law & Pol'y Int'l Bus. **12**: 643.

Taft, W. H. (1907). "Dawn of World Peace, The." Int'l Conciliation **1**: 857.

Thomas, J. (2016). Developing commercial law through the courts: rebalancing the relationship between the courts and arbitration. The Third Annual Bailii Lecture. Freshfields, London.

Volz, J. L. and R. S. Haydock (1995). "Foreign Arbitral Awards: Enforcing the Award Against the Recalcitrant Loser." William Mitchell Law Review **21**(3): 867.

Wetter, J. G. (1990). "The Present Status of the International Court of Arbitration of the ICC: An Appraisal." Am. Rev. Int'l Arb. **1**: 91.